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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT SEATTLE

8 ROBERT D. THORSON,  
9                   Petitioner,  
10                 v.  
11                 UNITED STATES OF AMERICA,  
12                 Respondent.

Case No. C18-136 RSM

ORDER STAYING PETITIONER'S  
MOTION UNDER 28 U.S.C. § 2255 TO  
VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL  
CUSTODY

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14                   **I. INTRODUCTION**

15                  This matter comes before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to  
16 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Dkt. #1. Because  
17 Petitioner has appealed his conviction to the Ninth Circuit Court of Appeals, because that appeal  
18 is still pending, and for the reasons set forth below, the Court now STAYS Petitioner's § 2255  
19 Motion pending resolution of the direct appeal.

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21                   **II. BACKGROUND**

22                  On February 13, 2017, Petitioner Robert Thorson was found guilty of one count of  
23 production of visual depictions of minors engaged in sexually explicit conduct (18 U.S.C. §§  
24 2251(a) and 2551(e)) and one count of possession of visual depictions of minors engaged in child  
25 pornography (18 U.S.C. §§ 2252(a)(4)(B) and (b)(2)). *United States v. Thorson*, Case No. CR16–  
26 277RSM, Dkt. #87 (Feb. 13, 2017). Petitioner received a 324-month sentence on count one and

1 a 240-month sentence on count two, with the sentences to run concurrently. *Id.*, Dkt. #132 (May  
2 12, 2017).

3 Upon being sentenced, Petitioner filed a notice of appeal. *Id.*, Dkt. #130 (May 12, 2017).  
4 Plaintiff's appeal is still pending before the Ninth Circuit Court of Appeals. *United States v.*  
5 *Thorson*, Case No. 17-30100 (9th Cir. 2018). Petitioner's appeal centers on whether the  
6 government committed misconduct by "cross-examining Thorson without a good faith basis,  
7 commenting on Thorson's right to counsel and to present a defense, and commenting on his right  
8 to remain silent." *Id.*, Dkt. #15 at 8. Petitioner's appeal seeks reversal of count one and remand  
9 for a new trial. *Id.* at 12.

10 Plaintiff subsequently filed a motion under 28 U.S.C. § 2255 on January 26, 2018  
11 ("§ 2255 Motion"). Dkt. #1. Petitioner's § 2255 Motion seeks relief on the basis of: (1)  
12 sufficiency of the evidence; (2) congressional overreach; (3) Speedy Trial Act of 1974; (4)  
13 ineffective assistance of counsel; (5) witness perjury; (6) post-*Miranda* silence;<sup>1</sup> (7) judicial bias;  
14 and (8) *Faretta* hearing. *Id.* Petitioner's § 2255 Motion seeks "reversal or dismissal of all  
15 charges." *Id.*

16 On January 31, 2018, the Court ordered the United States to file and serve an Answer.  
17 Dkt. #4. Respondent sought a stay in answer to the Petitioner's § 2255 Motion, pending  
18 Petitioner's appeal before the Ninth Circuit Court of Appeals. Dkt. #7. Petitioner has filed a  
19 reply opposing the request for a stay. Dkt. #8.

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24 <sup>1</sup> Petitioner argues specifically that the "prosecution impeached me on the witness stand using  
25 my post-*Miranda* silence against me." Dkt. #1 at 11. Petitioner expands that the government  
26 "impermissibly sought to draw adverse inferences from the Defendant's post arrest-post *Miranda*  
27 silence, and his right to contest an invasive motion to compel." Dkt. #1 at 51. Petitioner's  
argument in this regard track and overlap with the arguments advanced in Petitioner's direct  
appeal. Compare Dkt. #1 at 51–53 with *United States v. Thorson*, Case No. 17-30100, Dkt. #15  
(9th Cir. Sept. 25, 2018).

### III. DISCUSSION

A motion under 28 U.S.C. § 2255 permits a federal prisoner, in custody, to collaterally challenge his sentence on the grounds that it was imposed in violation of the Constitution or laws of the United States, or that the Court lacked jurisdiction to impose the sentence or that the sentence exceeded the maximum authorized by law. Petitioner is required, under 28 U.S.C. § 2255(f), to file a motion within one year of “the date on which the judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1).

The rule within the Ninth Circuit is that “[a] district court should not entertain a habeas corpus petition while there is an appeal pending in this court or in the Supreme Court.” *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997) (quoting *United States v. Deeb*, 944 F.2d 545, 548 (9th Cir. 1991), cert. denied, 503 U.S. 975 (1992); *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987)). There is uncertainty, however, as to:

whether this rule reflects a jurisdictional bar or simply a prudential concern. Compare *Feldman*, 815 F.2d at 1323 (dismissing defendant's premature habeas petition 'because the district court lacked subject matter jurisdiction to entertain [the] petition') with *Pirro*, 104 F.3d at 299 (noting that this rule was created "for reasons of judicial economy") and Rules Governing § 2255 Proceedings for the United States District Courts, Rule 5, Adv. Comm. Notes ("We are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances."). We need not resolve this discrepancy, however, because the district court should refrain from hearing LaFromboise's § 2255 motion until after he exhausts his direct appellate review rights under either theory.)

<sup>2</sup> *United States v. LaFromboise*, 427 F.3d 680, 686 n.9 (9th Cir. 2005).

<sup>2</sup> The Court notes that a judgment of conviction does not become final for the purposes of the one-year statute of limitations until “the time expires for filing a petition for certiorari contesting the appellate court’s affirmation of the conviction.” *Clay v. United States*, 537 U.S. 522 (2003). See also *Hosey v. United States*, 518 F. Supp. 2d 732, 734 (D. S.C. 2007) (conviction final for purposes of § 2255 “on the date when the petitioner could no longer seek direct review”) (quoting *United States v. Walker*, 165 F.3d 22 (4th Cir. 1998)); *United States v. Cabiness*, 278 F. Supp. 2d 478, 484 (E.D. Pa. 2003) (citing *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999));

1           In unusual and extraordinary circumstances, however, a defendant in a federal criminal  
2 prosecution may simultaneously have a direct appeal and a § 2255 proceeding each seeking to  
3 overturn the conviction and sentence. *See Jack v. United States*, 435 F.2d 317, 318 (9th Cir.  
4 1970). Direct appeals and collateral attacks under § 2255 serve different purposes. *United States*  
5 *v. Frady*, 456 U.S. 152 (1982) (explaining that direct appeal results in a final judgment perfected  
6 by appeal that may then be subjected to “a series of endless postconviction collateral attacks”).  
7 Likewise, different issues may be advanced on direct appeal and on collateral attacks under  
8 § 2255. *United States v. Walter-Eze*, 869 F.3d 891, 906 n.3 (noting that direct appeal is limited  
9 to the record and additional factual development is proper in collateral attack under § 2255)  
10 (citing *Massaro v. United States*, 538 U.S. 500 (2003)). For this reason, a court may allow, upon  
11 a showing of extraordinary circumstances by the petitioner, a collateral attack to proceed at the  
12 same time as a direct appeal. *United States v. Taylor*, 648 F.2d 565 (1981).

14           Respondent’s request for a stay is consistent with the general rule and Petitioner has not  
15 made a showing of exceptional circumstances. First, as a matter of judicial economy, a stay is  
16 warranted. Petitioner argues that the issues on direct appeal and in the § 2255 Motion do not  
17 wholly overlap because the direct appeal is only with regard to one count of the sentence. Dkt.  
18 #8 at 3. However, Plaintiff has asserted the same claims of misconduct in both the direct appeal  
19 and the § 2255 Motion. While the § 2255 Motion contains additional arguments and attacks both  
20 counts, the matters still overlap with regard to count one. Petitioner is correct that the direct  
21 appeal may not make his § 2255 Motion entirely moot, but the Court’s limited resources are not  
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*United States v. Dorsey*, 988 F. Supp. 917, 918 (D. Md. 1998) (citing *United States v. Simmonds*,  
25 111 F.3d 737, 744 (10th Cir. 1997); *Clark v. United States*, 955 F. Supp. 593, 594 (E.D. Va.  
26 1997); *United States v. Bazemore*, 929 F. Supp. 1567, 1569 (S.D. Ga. 1996)). Given the  
27 consensus that a judgment of conviction is not final until direct appeals are concluded, the  
reasonable conclusion is that consideration of a § 2255 motion may be untimely until all direct  
appeals are concluded.

1 well spent resolving an issue that may be resolved in the direct appeal. Thus, as a matter of  
2 judicial economy, the § 2255 Motion should not proceed while the direct appeal is pending.

3 Second, as a matter of avoiding duplicitous and inconsistent decisions, a stay is  
4 warranted. *See Taylor*, 648 F.2d at 572 (noting that delaying consideration of collateral attacks  
5 until after the resolution of direct appeals minimizes “the risk of duplicitous and conflicting  
6 judicial administration”); *United States v. Banaga*, Nos. CR-S-03-0064 WBS and CV-S-07-1853  
7 WBS, 2007 WL 3407427 (E.D. Cal. 2007) (noting that “the risk of inconsistent rulings from this  
8 court and the Court of Appeals is too high to allow this motion to proceed”). Petitioner argues  
9 that the direct appeal “will have no direct [e]ffect on this petition even if successful.” Dkt. #8 at  
10 5. Petitioner’s argument is speculative. There is overlap between the issues of the direct appeal  
11 and the § 2255 Motion. The overlap squarely creates a risk of duplicitous or inconsistent  
12 decisions and this Court will benefit from the higher courts’ resolution of the direct appeal. Thus,  
13 as a matter of avoiding duplicitous and inconsistent decisions, the § 2255 Motion should not  
14 proceed while the direct appeal is pending.  
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16 Third, because the Petitioner has not demonstrated extraordinary circumstances, a stay is  
17 warranted. In *United States v. Prows*, the Tenth Circuit Court of Appeals found extraordinary  
18 circumstances because there was a “complete dichotomy” of the issues on direct appeal and the  
19 § 2255 motion and because the government had sought the direct appeal. 448 F.3d 1223, 1229  
20 (10th Cir. 2006). Specifically, the court noted that finding a complete bar to hearing the § 2255  
21 motion would allow the government to “effectively keep [the petitioner] in custody for years  
22 while it exercises its appellate rights.” *Id.* Here, Petitioner has sought direct appeal of the  
23 judgment of conviction. *See also United States v. Swisher*, Nos. CV-09-55-S-BLW, CR-07-182-  
24 S-BLW, 2009 WL 1149445 (D. Idaho 2009) (noting that petitioner did not demonstrate  
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extraordinary circumstances where the petitioner and not the government had sought direct appeal). Because the issues of the direct appeal and the § 2255 Motion overlap and because the Petitioner sought the direct appeal, the § 2255 Motion should not proceed while the direct appeal is pending.

## VI. CONCLUSION

Having considered Petitioner's motion, Respondent's motion to stay in answer thereto, Petitioner's reply, and the remainder of the record, the Court hereby finds and ORDERS:

1. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. #1) is STAYED pending resolution of the appeal by the Ninth Circuit Court of Appeals.
2. The government shall provide notice to Petitioner and the Court when Petitioner's direct appeal has been resolved and request that the Court reset a briefing schedule for Respondent's response and Petitioner's reply, if any. Should Petitioner want to amend his § 2255 Motion following resolution of the direct appeal, he shall provide the Court notice as soon as practicable so that the Court may account for that in the Court's briefing schedule.
3. The Clerk of the Court is directed to mail a copy of this Order to Robert D. Thorson, No. 48042-086, FCI-Sheridan, Federal Correctional Institution, P.O. Box 5000, Sheridan, OR 97378.

DATED this 11<sup>th</sup> day of April 2018.

  
RICARDO S. MARTINEZ  
CHIEF UNITED STATES DISTRICT JUDGE